NO. 48870-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL MURRAY,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT (CORRECTED) DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

The Legislature created the Health Technology Clinical Committee (HTCC) to ensure that Washington citizens receive safe, effective, and cost-efficient treatment. RCW 70.14.100(1), .110(2)(a). The HTCC's medical experts methodically evaluate data, studies, and outcomes to determine the safety, efficacy, and cost-effectiveness of medical procedures in order to ensure that the State only purchases medical treatment that meets an exacting standard of care.

As this Court has held, once the HTCC determines that a treatment procedure should not be covered, state agencies that purchase health care benefits (including the Department of Labor and Industries) are prohibited from determining in an individual case that the technology or procedure is, nonetheless, proper and necessary treatment. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 627, 285 P.3d 187 (2012) (citing RCW 70.14.120), *review denied*, 176 Wn.2d 1021 (2013). *Joy* further held that neither the Board of Industrial Insurance Appeals nor a court could consider whether the treatment was proper and necessary treatment because the HTCC decision forecloses such consideration. *Id.* at 624.

Michael Murray provides no sound constitutional basis for reversing *Joy*. There is no due process violation. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 60–61, 119

S. Ct. 977, 143 L. Ed. 2d 130 (1999), the United States Supreme Court held that a workers' compensation claimant does not have a property interest for due process purposes in treatment that has not been determined to be reasonable and necessary. Murray does not have a vested property interest here because, under the HTCC's non-coverage determination, the procedure he seeks is not proper and necessary treatment.

Furthermore, under *Atkins v. Parker*, 472 U.S. 115, 129–30, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985), the government may make mass coverage decisions without an individual hearing addressing each individual's claimed entitlement to benefits. This means that just like the Legislature could enact a law that did not cover a given medical procedure, the Legislature can direct the HTCC to make uniform decisions that apply to all recipients of state-purchased health care, without an individual hearing for each recipient before implementation of the uniform policy.

The prerequisite to this delegation of authority is that there must be sufficient procedural protections to satisfy separation of powers considerations. Here these safeguards exist. The HTCC statute provides for notice, opportunity to comment, conflict-screenings, and open hearings, and the court may review HTCC's decisions through a constitutional writ of certiorari. This Court should affirm.

II. ISSUES

1. RCW 70.14.120(3) provides that a workers' compensation treatment disallowed by the HTCC "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." The Department followed the HTCC's determination that a procedure Murray sought was not a covered benefit. Did the Board correctly decline to consider whether Murray's denied procedure was proper and necessary treatment?

2. Under limited circumstances, a party may claim a substantive due process violation in disputes regarding vested rights in property interests. The United States Supreme Court has determined that workers' compensation claimants have no property interest, for purposes of the Due Process Clause, in having an insurer pay for medical treatments before a determination that the treatment is reasonable and necessary. Is there a vested right for a particular treatment procedure when a procedure is not covered as proper and necessary treatment under an HTCC determination?

3. The United States Supreme Court has held that the government may change benefits conferred to a class of people without providing an individualized notice and opportunity for a hearing. Does the HTCC system of uniform decisions violate procedural due process requirements?

4. Legislative decisions delegated to the executive branch are constitutional if the Legislature has provided procedural safeguards to control arbitrary administrative action. Do the statutory procedures of notice, open hearing, public comments, reconsideration of decisions and conflict screening, in combination with judicial review through a constitutional writ, provide adequate procedural safeguards such that the delegation of legislative power to the HTCC was lawful?

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III. STATEMENT OF THE CASE

A. The Legislature Established a Uniform, Evidence-Based Approach to Evaluating Health Care Procedures and Technologies to Achieve Better Medical Outcomes

The Legislature formed the Health Technology Clinical Committee to improve health care outcomes for individuals receiving state-purchased health care and to control costs. RCW 70.14.080–.130. The HTCC evaluates medical evidence in determining which health technologies the State will cover. RCW 70.14.110(1); RCW 70.14.080(5) (health technology is defined as "medical and surgical devices and procedures, medical equipment, and diagnostic tests."). The Legislature did this as an initiative to incorporate evidence-based medicine into the decision-making process regarding what technologies and procedures the State would fund. Final Bill Report on ES2HB 2575, 59th Wash. Leg., at 2 (Wash. 2006).[1]

Evidence-based medicine "is, at its simplest, the idea that the care that the health professionals provide should be based as closely as possible on evidence from well-conducted research into the effectiveness of health care interventions . . . ." Kieran Walshe et al., *Evidence-Based Management: From Theory to Practice in Health Care*, 79(3) Millbank Quarterly 429, 431 (2003).[2] Clinicians using evidence-based medicine

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[1] http://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bill%20Reports/House/2575-S2.FBR.pdf.

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2751196/.

integrate their clinical expertise with the best available medical evidence obtained from systematic research. Leah Hole-Marshall et al., *Evidence-Based Medicine Panel Discussion* (Oct. 6-7, 2016).[3] Similarly, other decision makers (medical societies, policy makers, and judiciary) weigh the strength of medical evidence in making decisions. *Id.*

Traditionally, medical providers have relied on personal experience as the basis for determining clinical appropriateness. *Id.* Such opinions are based on authority, tradition, and anecdotal experience. *Id.* On the other hand, an expert offering an evidence-based opinion begins by examining data compiled with more rigorous scrutiny and review before drawing upon personal experience. *Id.* This method shifts the focus from experience-based opinion to "a more stringent review and application of high-grade scientific evidence." Carter L. Williams, *Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines: What Effect Will EBM Have on the Standard of Care?*, 61 Wash. & Lee L. Rev. 479, 481 (2004).

Requiring evidence-based medical decisions furthers the legislative goal of promoting a statewide, uniform, health care policy. The Legislature recognized the need for developing uniform policies for state

[3] http://www.lni.wa.gov/ClaimsIns/Providers/WhatsNew/NewsUpdates/default.asp http://www.lni.wa.gov/ClaimsIns/Files/Providers/EvidenceBasedMedicinePanelDiscussion0715JW.pdf.

health care programs by creating the Health Care Authority, which "shall coordinate state agency efforts to develop and implement *uniform* policies across state purchased health care programs." RCW 41.05.013(1) (emphasis added). The purpose of uniformity in health care is to "minimiz[e] the financial burden which health care poses on the state, its employees, and its charges, while at the same time allowing the state to provide the most comprehensive health care options possible." RCW 41.05.006(2).

B. The HTCC Makes an Evidence-Based Decision as to Whether a Procedure or Technology Is Safe, Effective, and Cost-Efficient

Against that backdrop, the HTCC selects procedures and technologies for review based on "safety, efficacy, or cost-effectiveness." RCW 70.14.100(1)(a). It obtains a report from an evidence-based research center and requires the researchers to evaluate a given medical procedure's safety, health outcome, and cost. RCW 70.14.100(4)(a), (c). It requires the assessors to look to objective evidence about the procedure or technology and to base their recommendation on the greatest weight of objective evidence:

> (i) Give the greatest weight to the evidence determined, based on objective indicators, to be the most valid and reliable, considering the nature and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies; and (ii) take into account

> any unique impacts of the technology on specific populations based upon factors such as sex, age, ethnicity, race, or disability.

RCW 70.14.100(4)(d). The HTCC then considers "evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the systematic assessment conducted under RCW 70.14.100(4)" to determine whether a procedure should be covered. RCW 70.14.110(2)(a).

C. The HTCC Uses an Open and Transparent Process to Make Health Care Assessments and Determinations

The Legislature mandates that the HTCC use "an open and transparent process" to make its determination. RCW 70.14.110(2)(a). It is an independent committee of 11 practicing medical or health professionals in consultation with participating state agencies. RCW 70.14.090(1). Participating state agencies are the Health Care Authority, the Department of Labor and Industries, and the Department of Social and Health Services. RCW 70.14.080(6). The 11 members on the committee are comprised of six practicing, state licensed physicians and five other practicing, licensed health professionals who use health technology in their scope of practice. RCW 70.14.090(1)(a), (b). At least two members must have professional experience treating women, children, elderly persons, and people with diverse ethnic and racial backgrounds. RCW 70.14.090(1)(b)(ii).

The 2006 Act ensures transparency and independence in the HTCC's decision-making process:

- In making its determination, the committee shall consider "in an open and transparent process," evidence about the safety, efficacy, and cost-effectiveness of the particular technology. RCW 70.14.110(2)(a).

- The committee must provide an opportunity for public comment. RCW 70.14.110(2)(b).

- The committee meetings are subject to the Open Public Meetings Act (RCW 42.30). RCW 70.14.090(4).

- The committee members may not contract with or be employed by a health technology manufacturer or a participating agency during their term or for 18 months before the appointment. RCW 70.14.090(3)(a).

- The determinations are subject to review after 18 months, or sooner, based on evidence not known at the time of the original review. RCW 70.14.100(2).

D. The HTCC Found that the Safety, Efficacy and Cost of FAI Surgery Does Not Warrant Exposing Patients to the Surgery's Hazards

In 2010, the HTCC began its review of hip surgery for femoroacetabular impingement (FAI) syndrome. AR 71. For more than a year, HTCC conducted an extensive review process that included contracting with an evidence-based researcher who conducted a scientific assessment, holding public meetings, reviewing the scientific evidence, and providing an opportunity for formal public comment. AR 72, 74–390.

The HTCC determined that the evidence weighed against FAI surgery and directed the participating state agencies not to cover it. AR 76–79.

FAI surgery is an invasive procedure where a surgeon cuts off abnormal growths of bone, removes damaged cartilage, and reshapes the femoral neck of the hip. AR 75. Major potential complications include avascular necrosis,[4] femoral head-neck fracture, loss of fixation requiring revision, deep infection, symptomatic or significant limitation of hip motion, neurovascular injury, and symptomatic venous thromboembolism. AR 112–13.

In evaluating FAI surgery, the HTCC identified six key questions that the assessment answered based on its review of the evidence:

> (1) Is there a consistent, agreed upon definition for FAI?
> (2) What are the expected treatment outcomes of FAI surgery?
> (3) What is the evidence of efficacy and effectiveness of FAI surgery compared with no surgery?
> (4) What is the evidence of the safety of FAI surgery compared with no surgery?
> (5) What is the evidence that FAI surgery compared with no surgery has differential efficacy or safety issues in subpopulations?
> (6) What evidence of cost implications and cost-effectiveness of FAI surgery compared with no surgery exists?

AR 86–87.

In reviewing information, the HTCC evaluates the strength of evidence from "no evidence" to "very low" strength evidence to "high" strength evidence. AR 203. Higher strengths of evidence equate to more

[4] Cellular death of bone tissue.

certainty about an issue. AR 203. There was "very low" strength evidence regarding how to diagnose or identify candidates for FAI. AR 92, 128–141. There was also "very low" strength evidence whether it led to favorable treatment outcomes. AR 90, 93, 142–57. There was "no evidence" whether FAI surgery was more efficacious than the non-surgical options. AR 90–91, 93, 158–72. There was "very low" strength evidence whether FAI surgery had short term effectiveness. *Id.* The HTCC found "no evidence" that FAI surgery had long-term effectiveness. AR 91, 93, 172. There was only "low" strength evidence that FAI surgery was safe. AR 91, 94, 173–77. Finally, there was "no evidence" that FAI surgery was cost-effective. AR 92, 94, 182. In short, the evidence did not show that FAI surgery should be approved based on patient outcomes.

As part of its evaluation, the HTCC considered the ten public comments it received, which included comments from several lay people. AR 345–47.[5] Based on its comprehensive review and consideration of comments that it received, on November 18, 2011, the HTCC decided not to cover FAI surgery as necessary and proper treatment. AR 71, 79; RCW 70.14.110, .120.

[5] Although Murray says the medical and scientific communities "quickly united" against the proposal, the record shows only a handful of medical comments. Appellant's Br. 17; AR 256, 261, 289, 354, 365, 366.

Since the HTCC issued its decision, no one has requested that the HTCC revisit its FAI surgery determination. AR 72; RCW 70.14.100(2).

E. The Department Denied Payment for FAI Surgery Because the HTCC Has Disapproved This Treatment, and the Board and Superior Court Affirmed

Michael Murray sustained an industrial injury in August 2009. AR 57. The Department allowed his claim and provided medical treatment. AR 57. Dr. James Bruckner, Murray's provider, asked the Department to authorize surgery regarding his hip condition. AR 57, 60. The Department denied payment for FAI surgery because the HTCC disallowed its coverage. AR 57, 63–64. Since the HTCC's decision binds the Department, it has not independently passed on the issue of whether the FAI surgery meets the criteria of being medically proper and necessary. RCW 70.14.120; AR 58, 63–64. Dr. Bruckner performed the surgery on Murray without authorization from the Department. AR 58, 67–68.

Murray appealed the Department's decision denying payment for the surgery to the Board. AR 26. The Board affirmed the Department and Murray appealed to superior court. AR 3, 16–19; CP 1–2. The parties cross-moved for summary judgment, and the superior court granted summary judgment to the Department. CP 123–24. The superior court found:

> no genuine issues of material fact with respect to whether the Health Technology Clinical Committee (HTCC) has

> made a non-coverage decision regarding hip surgery for femoroacetabular impingement syndrome and that the Department of Labor & Industries is a participating agency per RCW 70.14.080(6) that must follow a determination of the HTCC. Mr. Murray shows no constitutional violation.

CP 124. Murray appeals. CP 125.

IV. STANDARD OF REVIEW

In workers' compensation cases, the appellate court reviews the trial court's decision, not the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).[6] In appellate review, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews a summary judgment order de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The court reviews questions of statutory construction de novo. *Birrueta v. Dep't of Labor & Indus.*, ___ Wn.2d ___, 379 P.3d 120, 122 (2016). As the front-line agency addressing treatment issues, the Department's interpretation of the Industrial Insurance Act receives

[6] The Administrative Procedure Act does not apply to appeals involving disputes about what benefits an injured worker should receive under the Industrial Insurance Act. *Rogers*, 151 Wn. App. at 180; RCW 34.05.030.

deference. *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013).

The court reviews constitutional issues de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). "In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010).

V. ARGUMENT

The Legislature established a uniform system to evaluate health care benefits in order to improve outcomes for Washingtonians receiving state-funded health care benefits. RCW 70.14.110(1), (2); RCW 41.05.006(2). Not allowing individual challenges to HTCC determinations furthers the uniformity of this system by preventing a hodgepodge of conflicting decisions in individual cases based on anecdotal medical evidence. This Court should follow *Joy* to uphold the HTCC's robust process.

Murray's constitutional challenges lack merit. First, Murray cannot demonstrate a substantive due process violation because, as a claimant, he had no vested property interest in receiving a treatment procedure that is

by law not proper and necessary treatment. Second, he cannot demonstrate a procedural due process violation because the government may make mass coverage decisions that uniformly affect claimants. And finally, while Murray incorrectly asserts that no one may seek judicial review of an HTCC determination, the law does provide an opportunity for judicial review as HTCC decisions are subject to constitutional writs. This opportunity for judicial review, when combined with the safeguarding procedures in the HTCC statute, provides adequate procedural protections so the Legislature lawfully delegated its legislative power to the HTCC.

Murray invites this Court to strike down the evidence-based approach the Legislature has chosen and replace it with the anecdotal approach the Legislature has rejected so he may be reimbursed for his unauthorized surgery. This Court should decline to do so.

A. *Joy* Correctly Decided that a Claimant May Not Circumvent an HTCC Decision in an Administrative or Judicial Appeal

Following this Court's case law and statutes, the Department and Board had to follow the HTCC's determination that FAI is not a covered form of treatment. By statute, the HTCC shall determine, for each health technology or procedure reviewed, "[t]he conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies . . . ." RCW 70.14.110(1)(a). It determines criteria for when a procedure is "medically necessary, or

proper and necessary treatment." RCW 70.14.110(1)(b). When the HTCC determines that a technology should not be covered, that technology is never proper and necessary as a matter of law. *Joy*, 170 Wn. App. at 624. This is because the technology "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." RCW 70.14.120(3). Under this statute, "[an] HTCC non-coverage determination is a determination that the particular health technology is not medically necessary or proper in *any* case." *Joy*, 170 Wn. App. at 624.

In *Joy*, the court decided that once the HTCC has ruled on a health care technology, the Department, Board, and reviewing courts must follow the decision. *See Joy*, 170 Wn. App. at 623. There, this Court analyzed the interplay between two statutory provisions: RCW 70.14.120(1), which mandates that participating agencies comply with HTCC determinations, and RCW 70.14.120(3), which precludes individual claimants from receiving a rejected technology or procedure. RCW 70.14.120(3) unambiguously precludes individualized determinations, stating:

> A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the health technology clinical committee under RCW 70.14.110, or for which a condition of coverage established by the committee is not met, *shall not be subject to a determination in the case of an*

> *individual patient as to whether it is medically necessary, or proper and necessary treatment.*

RCW 70.14.120(3) (emphasis added).

The claimant in *Joy* acknowledged that RCW 70.14.120(1) prohibited the Department, as a participating agency, from approving the spinal cord stimulator after the HTCC determined it was not a covered benefit. *Joy*, 170 Wn. App. at 622. But Joy argued that RCW 70.14.120 allowed a reviewing court to determine that the treatment was nonetheless proper and necessary for an individual claimant. *Id.* at 622–23. Like Murray, she argued that the "participating agency" reference in subsection (1) applied to limit who subsection (3) applied to, and under this logic reasoned that subsection (3) did not apply to a reviewing agency or court. *Joy*, 170 Wn. App. at 623. Therefore, Joy believed that an HTCC determination does not bind the Board or a superior court under RCW 70.14.120(3). *Id.*

The *Joy* Court correctly rejected this argument, reasoning that the Legislature did not insert subsection (1)'s reference to "participating agency" in subsection (3), and therefore subsection (3)'s prohibition on a "proper and necessary" review applies to the Board and reviewing court, as well as the Department. *See Joy*, 170 Wn. App. at 623. Thus, the statute mandates that HTCC blanket determinations of non-coverage are not

subject to individualized hearings at the Board or reviewing court regarding whether the treatment at issue is medically proper and necessary. *Id.*

The *Joy* Court appropriately recognized the important policy objectives in having uniform policies to ensure that doctors use only safe procedures and technology. *Id.* at 621, 626–27. It concluded correctly that absurd results would occur if the Department could not make an individual determination as to whether a health technology was proper and necessary treatment but a reviewing court was permitted to do so. *Id.* at 626–27. In short, holding that an individual claimant's appeal could reverse an HTCC determination would thwart the Legislature's mandate to have a uniform system to ensure safe treatment.

Contrary to Murray's pleas otherwise, the Court should apply stare decisis and follow the *Joy* decision. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before the court abandons it. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010). Murray cannot meet either element.

The *Joy* Court rejected the argument Murray raises here, that RCW 70.14.120(4) allows him to appeal to the Board a Department decision denying authorization of a procedure proscribed by the HTCC. Appellant's Br. 26; 170 Wn. App. at 624. The court held that RCW

70.14.120(1) and (3) controlled the parameters of what an individual could contest in an appeal—namely, he or she cannot claim a denied procedure is proper and necessary treatment. 170 Wn. App. at 624–25. Under subsection (4), an individual has appeal rights to argue that the HTCC decision does not apply to the individual or that the participating agency did not comply with subsections (1)(a) or (b) of RCW 70.14.120. But as held in *Joy*, RCW 70.14.120(3) controls the scope of the appeal, and a party cannot argue whether the technology in question is proper and necessary treatment for the individual claimant. *Joy*, 170 Wn. App. at 623–25. And it is not just the FAI surgery that Murray seeks that his proposed rule would allow for, but a multitude of risky and unproven procedures, such as the spinal cord stimulator at issue in *Joy*.

Contrary to Murray's arguments, the Governor's veto message does not show that Murray has the right to appeal a decision that his treatment is not proper and necessary under an HTCC decision. *See* Appellant's Br. 26. *Joy* correctly rejected a similar argument and, after considering the veto and the Legislature's decision to not override it, the court concluded that "the legislative history does not support an interpretation of RCW 70.14.120(4) allowing injured workers to relief on appeal from L & I's denial of medical treatment that the HTCC has determined is not covered." *Joy*, 170 Wn. App. at 626.

Moreover, Murray is wrong in claiming that the Governor unintentionally eliminated an individual appeal right. Appellant's Br. 15, 23. The Governor did not veto a provision that would have created a right for an individual who contests application of an HTCC determination by a participating agency to appeal an HTCC determination with reference to the individual's case. Instead, the statutory provision that the Governor vetoed would have provided for the Health Care Authority to set up a system to review HTCC decisions in general:

> The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee.

Laws of 2006, ch. 307, § 6; RCW 70.14.080(1) ("administrator" means the administrator of the Health Care Authority). The Legislature upheld the vetoing of this provision but in doing so it did not intend to create the right to present evidence that a non-covered procedure is proper and necessary treatment because it also adopted subsection (3), which bars a process of individual determinations in the case of an individual claimant.

Since *Joy*, the Legislature has not amended RCW 70.14.120(3) despite amending the HTCC Act in 2016. Laws of 2016, 1st Spec. Sess., ch. 1. By not amending the statute, the Legislature has acquiesced to the

interpretation given the statute by the court. *See Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

B. Under the State Constitution, Individuals Can Contest an HTCC Decision by Obtaining a Constitutional Writ

Because individuals can challenge HTCC decisions by obtaining a constitutional writ of certiorari, the HTCC does not have "unreviewable authority," as Murray repeatedly asserts. *See* Appellant's Br. 1, 3, 4-5, 10, 16, 18, 23. As the Supreme Court has explained, "The superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Although the HTCC statute does not provide a mechanism for substantively challenging HTCC determinations, it is well-established that Washington courts have the inherent power to review agency decisions to ensure that the action is not arbitrary and capricious when a statute does not provide for a separate appeal. *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983); *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982) (a statutory bar to appeal does not make statute unconstitutional because of the inherent right to judicial review).

The courts may review nonjudicial agency decisions—such as the quasi-legislative policy decisions present here—under their inherent

judicial power, which is called a constitutional certiorari. *Dorsten v. Port of Skagit Cty.*, 32 Wn. App. 785, 788–89, 650 P.2d 220 (1982). In other words, because there is not a statutory right to appeal an HTCC decision, individuals can challenge HTCC's coverage decisions by seeking a constitutional writ. The writ of certiorari would not be for an individual application by the Department of Labor and Industries of the HTCC determination in a specific workers' compensation case but rather the challenge would be to the HTCC determination itself.

The Department argued in superior court that the court could review an HTCC determination under a constitutional writ, as well as making the related argument that the constitutional writ protection provides adequate procedural safeguards in considering whether the Legislature properly delegated its power. CP 67-71, 82-86; *see* Part V.D.2., *infra*. Murray cited to the constitutional writ at superior court. *E.g.*, CP 91. It is striking that Murray no longer acknowledges the constitutional writ line of cases in his brief, instead arguing that "no court . . . can review the HTCC decision." Appellant's Br. 18. No doubt his "lying in wait" strategy is to address the adequacy of a constitutional writ in his reply, but this Court should not allow him to raise new arguments in his reply brief. *See Joy*, 170 Wn. App. at 629-30.

C. The HTCC Statute Does Not Violate Due Process Requirements

Murray provides no sound constitutional basis for reversing *Joy*. The United States Supreme Court has already determined that a workers' compensation claimant does not have a property interest in treatment that is not reasonable and necessary treatment. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60–61. Under the HTCC's determination, the FAI surgery is not proper and necessary treatment. Murray shows no reason why he can claim a due process right to unauthorized treatment when the United States Supreme Court has said that claimants like him do not have a property interest to trigger the due process analysis, particularly when no determination was ever made that an FAI surgery would be proper and necessary treatment, either in general or in Murray's case in particular.

Murray implicitly acknowledges that the Legislature may set the parameters on the treatment it reimburses, as illustrated by his multiple references to the legislative decision to reimburse proper and necessary treatment only. *See* Appellant's Br. at 1-4, 8, 10-12, 15-16, 19, 23, 25. The Washington State Supreme Court has held that the system of a limitation on remedies found in the Industrial Insurance Act does not violate due process. *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 597, 605, 158 P. 256 (1916), *abrogated on other grounds by Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). Murray's theory is that he has a

vested property right in proper and necessary treatment—but the Legislature has defined the scope of proper and necessary treatment in the HTCC statute. Murray shows no due process reason why the Legislature cannot enact a statute that defines when treatment is proper and necessary.

Additionally, Murray's argument that the HTCC statute violates due process because HTCC determinations are allegedly "oppressive" hinges on his mistaken conclusion that the HTCC decisions are unreviewable. Appellant's Br. 23. But this is simply not the case as those decisions are reviewable through a constitutional writ. *See* Part V.B., *supra*. What Murray wants is an individual appeal right to the HTCC decision itself in his individual workers' compensation case (Appellant's Br. 21), but Murray presumably would not dispute that the Legislature could enact a statute that denies coverage for FAI surgery outright. Presumably he would concede that he would not receive an individual hearing on whether the Legislature's decision was correct, as there is no such right. *See Atkins*, 472 U.S. at 129–30 (government may set uniform benefit levels without individualized notice and hearing); Part V.C.3., *infra*. So the only question here is whether the Department's delegation of legislative authority to the HTCC is lawful. It is lawful because adequate safeguards exist in the HTCC statute and because judicial review may be obtained through a constitutional writ. *See* Part V.D., *infra*.

1. Murray does not have a vested right in receiving a treatment procedure

Murray's due process challenges fail because he does not have a vested right in receiving any particular form of treatment, including an FAI procedure. A party alleging a due process violation must first establish a legitimate claim of entitlement to the life, liberty, or property at issue. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 732, 57 P.3d 611 (2002). This may be a vested property right, which requires legal title to property as opposed to a "mere expectation" of a right:

> A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

Id. at 733 (quotations omitted).

Although the Industrial Insurance Act generally provides for coverage of proper and necessary treatment for an injured worker whose condition is not at maximum medical improvement (RCW 51.36.010; WAC 296-20-01002), this does not mean that a claimant has a vested right to receive payment for any procedure he or she may seek. This is because a claimant has no vested right in treatment that is not proper and necessary treatment. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60–61; RCW 51.36.010.

In *American Manufacturers*, the Supreme Court determined that workers' compensation claimants have no property interest, for purposes of the Due Process Clause, in having an insurer pay for medical treatments before a determination has been made that the treatments are reasonable and necessary. 526 U.S. at 60–61. In that case, the claimants argued that once liability is established for a work place injury, the employer is obligated to pay for certain benefits, including medical care. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59-60. Pennsylvania provided for payment of only "reasonable" and "necessary" medical treatment for workers' compensation recipients. *Id.* at 44, 60. In finding no property interest, the Court contrasted the workers' compensation benefits scheme with other benefits schemes, such as federal welfare or social security disability, where entitlement to benefits has been established and there is an interest in continued benefits. *Id.* at 60-61. Instead, the Pennsylvania law expressly limited the coverage of treatment to reasonable and necessary treatment. *Id.* at 60. Without that finding, there was no property right:

> Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in *Goldberg* and the recipient of disability benefits in *Mathews*.

Am. Mfrs. Mut. Ins. Co., 526 U.S. at 60-61 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)).

In other words, there has to be an entitlement to establish a property right, and an entitlement is only established if there has been a finding that the treatment is proper and necessary. RCW 51.36.010 has an indistinguishable predicate to entitlement that the Pennsylvania statute in *American Manufacturers* had: it authorizes only "*proper and necessary* medical and surgical services." *See Dep't of Labor & Indus. v. Kantor*, 94 Wn. App. 764, 776, 973 P.2d 30 (1999). Murray emphasizes that the Legislature has provided for proper and necessary care but ignores that the Legislature amended this right when it enacted the HTCC statute, which specifically limits the benefits the Department may provide. RCW 70.14.110, .120.[7]

[7] The Legislature enacted the HTCC statute in 2006. Laws of 2006, ch. 307. Murray was injured in 2009. AR 57. Rights under the Industrial Insurance Act accrue at the date of injury. *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 25, 380 P.2d 730 (1963).Thus, no hypothetical right vested as RCW 70.14.110 always applied to Murray, and this statute defines what is the proper and necessary treatment under RCW 51.36.010. The fact that the 2011 HTCC determination post-dated the 2009 injury is of no moment because the 2006 HTCC Act fixed the requirement that proper and necessary determinations are subject to the HTCC limitation. Moreover, he did not seek the surgery until 2013, after the 2011 HTCC determination. AR 60, 74. The Department does not rely on an *Ashenbrenner* argument because the Department also believes that the HTCC provisions cover treatment provided to workers who were injured before 2006, an issue not before this Court. Murray cannot raise a belated *Ashenbrenner* argument in his reply. *Joy*, 170 Wn. App. at 629-30 (parties cannot raise new arguments in reply).

Joy determined that because the Industrial Insurance Act entitles injured workers only to medically proper and necessary treatment, and because non-covered procedures are not proper and necessary treatment as a matter of law, there was no right under RCW 51.36.010 to the treatment. *Joy*, 170 Wn. App. at 624. This is because non-covered procedures are "not medically necessary or proper in *any* case." *Id.* at 624. Therefore, Murray cannot have a property interest in treatment under RCW 51.36.010 here because a determination under RCW 70.14.110 and .120 controls over RCW 51.36.010. So nothing vested. There is no property interest in the reimbursement of an unauthorized procedure.

Murray mistakenly relies on *Willoughby*. In stating that "'all workers who suffer an industrial injury covered by the Industrial Insurance Act . . . have a vested interest in disability payments upon determination of an industrial injury,'" the *Willoughby* Court did not hold that treatment that has been determined not to be proper and necessary medical care is a vested property right. Appellant's Br. 19 (quoting *Willoughby*, 147 Wn.2d at 733).

Willoughby does not relieve Murray from his obligation to show that the treatment he seeks is proper and necessary to show an entitlement. In *Willoughby*, the Court found a vested property interest in permanent partial disability benefits because Willoughby had more than a mere

expectation in permanent partial disability—the Department had determined that he was entitled to such an award. 147 Wn.2d at 729, 733. Willoughby therefore had a legal or equitable title to the present or future enjoyment of the disability award ($10,260.81), which invoked due process protections. *Id*; *see also Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 675, 175 P.3d 1117 (2008) (where the Department had issued orders entitling claimants to compensation on appeal and their claims on appeal were for only the amount of that compensation, their rights had vested), *aff'd on other grounds*, 169 Wn.2d 81 (2010). In contrast, Murray's request for FAI surgery treatment has no foundation because no determination was ever made that it was proper and necessary and, under the HTCC determination, it is not proper and necessary treatment. Therefore he can make no claim that it is a vested right.

Ignoring that FAI surgery is not covered as proper and necessary treatment, Murray argues for a vested right in this treatment on the theory that, under some circumstances, case law allows for the Department to pay for a surgery it did not pre-authorize if the surgery later turned out to be effective—the hindsight test. Appellant's Br. 22; *Rogers*, 151 Wn. App. at 185. But the hindsight test cannot apply because the HTCC determined that the surgery was not necessary and proper "in *any* case" and there may

be no review in an individual case of that decision. *Joy*, 170 Wn. App. at 624; RCW 70.14.120.[8]

In summary, a claimant has no vested right to unauthorized treatment and here the HTCC's non-coverage determination means the FAI surgery is not proper and necessary treatment, so no property right has attached. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60–61. And the HTCC did not disturb a vested right in a procedure because no previous determination had ever been made that the FAI surgery was proper and necessary.

2. Murray shows no substantive due process violation

Murray has not demonstrated a vested property interest that would allow him to make a substantive due process claim, but even if he did he shows no basis for relief. His argument fails because he shows no reason

[8] Murray misapprehends the law regarding the hindsight test. He claims that "[b]ecause outcomes from new procedures are unproven both the Department and reviewing courts authorize surgical procedures *in hindsight*." Appellant's Br. 22. But Murray is not accurately describing the hindsight test. The relevant hindsight case, *Rogers*, addressed the administrative regulation requiring advance Department approval for standard surgery, and the hindsight test that mitigates this rule if unauthorized but standard surgery is successful. 151 Wn. App. at 185. A separate regulation governs controversial surgeries, and the courts have never applied the hindsight test to this rule. WAC 296-20-02850 (the department or self-insurer will not authorize or pay for treatment measures of a controversial, obsolete, investigational or experimental nature, except under limited circumstances). The HTCC determination, however, would control over the hindsight test and regulation. *See* RCW 70.14.120; *Joy*, 170 Wn. App. at 624.

why the Legislature cannot enact a statute that defines the parameters of a statutory benefit.[9]

Due process allows for the protection of the individual against arbitrary government actions, whether in denying fundamental procedural fairness (procedural due process) or in exercising power arbitrarily, without any reasonable justification in the service of a legitimate government interest (substantive due process). *Cradduck v. Yakima Cty.*, 166 Wn. App. 435, 442–43, 271 P.3d 289 (2012).

For substantive due process claims arising out of a vested property interest, *Willoughby* articulates the test for arbitrariness by focusing on how the purpose of the statute is achieved:

> Whether a statute deprives one of life, liberty or property without due process depends on (1) whether the [statute] is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive.

Willoughby, 147 Wn.2d at 733.

Murray concedes that the first prong is satisfied: the statute has a legitimate public purpose of seeking uniformity in health care coverage decisions. Appellant's Br. 20. The statute also has the legitimate goal of using evidence-based medicine to achieve better outcomes for patients.

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[9] As discussed above, this is not a case of a vested right that predated a statutory change. *See* n.7, *supra*. Nor has Murray argued that there is an unlawful retroactive application of the HTCC statute. Appellant's Br. at 3-6.

The second and third prongs are satisfied because it is reasonable, and is not unduly oppressive, to have a uniform system of benefits for claimants to produce safe outcomes in health care. One claimant may wish to rely on anecdotal evidence to receive a denied procedure, but it is reasonable, and not unduly oppressive, to make safety determinations for all users of state-purchased health care benefits. This is the sort of legislative policy-making that due process does not forbid.

Murray cites no authority supporting his argument that he must have an individual appeal right of a legislative decision to shape the contours of state-provided benefits in order to satisfy substantive due process concerns.[10] A court may generally assume that when a party cites no authority, the party has found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Murray argues that because he generally has no right to sue his employer under the Industrial Insurance Act, this somehow means that the Legislature cannot provide standards as to when it will provide benefits. Appellant's Br. 21; *see also* Appellant's Br. 10. Murray cites *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016), to argue that there is a "'tipping point,' where the diminution of benefits becomes so significant

[10] As discussed below, there is no such right. *See* Part V.C.3., *infra*.

as to constitute a denial of benefits—thus creating a constitutional violation." Appellant's Br. 21-22, 27.

This Court should reject this argument for three reasons. First, the Florida court in *Westphal* considered an access to justice constitutional claim. *Westphal*, 194 So.3d at 313. Although Murray makes a passing reference to a "constitutional right to access the courts," he does not provide any Washington law that provides that shaping the scope of treatment benefits implicates any Washington right to access the courts. Appellant's Br. 10, 16. He does not assign error or state an issue on this theory. Appellant's Br. 3-6. His passing treatment of this issue is insufficient to command judicial review of such an issue. *Joy*, 170 Wn. App. at 629 (court does not consider conclusory argument unsupported by citation to authority).

Second, under the Industrial Insurance Act, workers and employers made the "grand compromise" to provide workers with the right to "sure and certain relief" in the form of statutorily-defined benefits instead of having the right to pursue relief through tort litigation. RCW 51.04.010; *Birklid*, 127 Wn.2d at 859. Under this system, the claimant does not receive all of the damages he or she could have received at common law. Instead, the claimant receives only the benefits dictated by the workers' compensation statutes, and the court has repeatedly upheld this system.

Weiffenbach v. City of Seattle, 193 Wash. 528, 535, 76 P.2d 589 (1938); *Stertz*, 91 Wash. at 590-91. Thus, the Legislature may limit the type of benefits provided, consistent with the grand compromise.

Finally, *Westphal* dealt with a system that imposed a two-year limitation on temporary total disability benefits and it was this limitation that the Court concluded did not provide a "'reasonable alternative' to tort litigation." *Westphal*, 194 So.3d at 325.

Creating a uniform system to determine if health care procedures are safe and effective does not trigger a "tipping point." Appellant Br. 21. It does not "undermin[e] the grand compromise." Appellant's Br. 16. Here the Legislature is not denying all industrial insurance treatment benefits; it is denying those that medical experts find should not be covered based on factors such as safety, efficacy, and cost. As Murray's arguments implicitly acknowledge, the Legislature may impose standards on what procedures it covers: only proper and necessary treatment. Appellant's Br. at 1-4, 8, 10-12, 15-16, 19, 23, 25. The HTCC statute defines what is allowable treatment just like RCW 51.36.010 and related regulations. Murray sought reimbursement for a single procedure that did not meet legislatively mandated standards, and the denial of it was not a systemic deprivation of disability benefits as in *Westphal*.

Murray's arguments do not implicate any substantive due process concern because he has shown no vested right and, even if he did, it is reasonable and not unduly oppressive for the Legislature to create a uniform system of benefits for claimants to produce safe outcomes in health care in a cost-effective manner.

Murray would have the individual doctor decide what is safe and effective; the Legislature would have a committee of learned medical experts evaluate this issue instead. There is nothing unreasonable or oppressive about the Legislature's approach.

3. Procedural due process requirements are not implicated when the government makes a mass coverage decision

Murray's procedural due process argument fails because it is well-established that the constitution does not require an individualized appeal for mass coverage decisions. Appellant's Br. 21-22; *Atkins*, 472 U.S. at 129–30 (government may set uniform benefit levels).[11] In *Atkins*, Congress made a change to the food-stamp program and the food stamp recipients argued they should have individualized notice about this change. 472 U.S. at 117. The Supreme Court rejected that argument,

[11] *See also Richardson v. Belcher*, 404 U.S. 78, 81, 92 S. Ct. 254, 257, 30 L. Ed. 2d 231 (1971) (procedural due process concerns do not stop the "power of Congress to make substantive changes in the law of entitlement to public benefits"); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.").

holding that the procedural component of the Due Process Clause does not restrain Congress's ability to make substantive changes in the law of entitlement to public benefits. *Atkins*, 472 U.S. at 129.

Thus, the Legislature may establish the parameters of rights to benefits without individual notice or a hearing. *See Hoffman v. City of Warwick*, 909 F.2d 608, 620 (5th Cir. 1990) (due process does not require individualized hearing for class-wide benefits determinations); *see also Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 867–68, 665 P.2d 1328 (1983) (procedural due process requirements not implicated by exercise of rate making power). Due process rights do not attach to purely legislative acts. *Holbrook, Inc. v. Clark Cty.*, 112 Wn. App. 354, 364, 49 P.3d 142 (2002) (area-wide zoning actions involving the exercise of policy-making are considered legislative).

The Legislature could have enacted a statute that denied payment of FAI surgery outright instead of appointing a committee of learned experts to investigate whether it and other forms of treatment should be covered. Murray could not reasonably deny that he would be bound by such a statute. Here, the Legislature delegated its legislative power to the HTCC because it presumably concluded that the HTCC was better situated to make coverage decisions about medical technology and procedures. As long as this delegation was lawful then the HTCC determinations apply

throughout the state.Due process does not require the government to cover all treatment or provide an individual appeal for its uniform decisions.

In any event, Murray cannot raise a procedural due process claim because he has no private interest. Under *Mathews*, there has to be a "private interest" involved that triggers use of the three-part *Mathews* test.

In the three-part test, the court considers (1) the "private interest" impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Mathews*, 424 U.S. at 334. But there is no private interest because Murray does not have a protected interest in the treatment because it was never determined to be proper and necessary. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59 ("Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process."); Part V.C.1., *supra*. Given that a property interest has not attached, this Court should not consider Murray's procedural due process claim.

But if the Court does consider the issue, application of all the factors shows the State's procedures satisfy due process. With respect to the procedures provided under the second factor, Murray received notice

of the Department's decision and had the opportunity to contest whether the HTCC decision applied to him or whether the Department complied with subsections (1)(a) or (b) of RCW 70.14.120. RCW 70.14.120(4). Murray cites no authority for the proposition that there is a due process right to challenge every aspect of a benefit determination and the Court should disregard his unsupported argument. *See In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (parties must provide citation to authority to obtain judicial consideration of their constitutional arguments).

And finally, the government has a strong interest in establishing a uniform system of health care that provides the best outcomes for all Washingtonians using state-purchased health care. Murray may seek to establish a benefit from the surgery in his particular case, but this is the sort of anecdotal approach that should not set health care policy—instead the Legislature properly endorsed an evidence-based approach.

Evaluating these factors together shows that the Legislature has provided all the process that is required.

D. The Legislature Lawfully Delegated Its Power to the HTCC as Shown by the HTCC Statute's Procedural Protections and the Availability of a Constitutional Writ

The Legislature's delegation of its legislative power to the HTCC to make uniform health care decisions makes sense as it is not practical to have a legislative bill over every treatment procedure. The Legislature

may authorize the executive branch to take action, and a delegation of legislative power is constitutional, when: "(1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). No separation of powers violation is found if these standards are met. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 859-60, 357 P.3d 615 (2015).

Murray does not dispute that the HTCC statute satisfies the test's first prong but rather argues it is unconstitutional under the second prong. But since adequate safeguards exist, Murray's argument fails.

1. Notice and opportunity for comment provide adequate procedural safeguards for the development of HTCC decisions

RCW 70.14.110 provides procedural safeguards for HTCC decisions by incorporating expertise, transparency, and independence in the HTCC's decision-making process. RCW 70.14.110(2)(a). HTCC members are independent medical experts. RCW 70.14.090(1). They may not contract with a health technology manufacturer or a participating

agency during their term or for 18 months before the appointment. RCW 70.14.090(3)(a).

The HTCC takes public comment for each determination. RCW 70.14.110(2)(b). The committee meetings are subject to the Open Public Meetings Act (RCW 42.30), which requires that all decisions be made in a meeting open to the public with advance notice. RCW 70.14.090(4); RCW 42.30.060. But the HTCC goes further. It posts online notification that it has selected a health technology for review and shares when it will initiate the review and how an interested party may submit evidence or provide public comment. RCW 70.14.130. The HTCC also provides online notification when it issues a determination. RCW 70.14.130.
The HTCC may revisit its decisions to confirm that they are consistent with the most up-to-date evidence-based research. RCW 70.14.100(2).

Taken together, these statutory provisions ensure that interested parties may comment on HTCC proceedings and receive notice of HTCC determinations. They also prohibit conflicts of interest and backdoor dealings. And they provide an opportunity for the HTCC to revisit a decision if the weight of the medical evidence shows that a procedure has become safe, effective, and cost-efficient treatment. Since the HTCC issued its decision about FAI surgery, no one has requested that the HTCC revisit its determination. AR 72.

Although the HTCC is not an agency subject to the Administrative Procedure Act (APA), this is not determinative as to whether adequate procedural safeguards exist, as Murray acknowledged below. CP 20; RCW 70.14.090(5); *see Brown v. Vail*, 169 Wn.2d 318, 332, 237 P.2d 263 (2010) (drug protocols met constitutional standards even though no review under the APA).[12] The transparent process that allows for notice and public comment provides the same sort of procedure found in the APA rulemaking requirements and provides adequate procedural safeguards for HTCC decision-making.

2. The constitutional writ provides adequate procedural safeguards by judicial review of HTCC decisions

Judicial review of HTCC decisions by a constitutional writ provides an adequate safeguard regarding these decisions. Although Murray now incorrectly claims that HTCC decisions are not reviewable, Murray conceded below, as he must, that a statutory scheme need not itself provide the procedural protections. CP 49 (a delegation of authority is constitutional when "[c]ase law permits judicial review."); Appellant's Br. 23. The case law applying constitutional principles provides for this review. As discussed above, the writ of certiorari process applies to decisions of the HTCC. *See* Part V.B., *supra*; *Dorsten*, 32 Wn. App. at

[12] Murray quotes a passage from *Brown* that approves of following APA requirements, but *Brown* did not require it. Appellant's Br. 25; *Brown*, 169 Wn.2d at 332.

788–89 (the court can review nonjudicial agency decisions under its inherent judicial power in a constitutional writ of certiorari).

Not only does a lack of statutory review not make a statute unconstitutional, but courts have considered the writ process as fulfilling the *Barry & Barry* procedural protection requirement. Recently, in *Automotive United*, the Court held that a statute that did not provide an obvious route for judicial review met the *Barry & Barry* procedural safeguards test. 183 Wn.2d at 861. In that case, the plaintiff challenged statutes that authorized executive officers to negotiate fuel tax refunds to tribes, contending that the statutes improperly delegated legislative authority to the Governor. *Id.* at 853-54. The Court concluded that separation of powers does not require the challenged statute to contain procedural safeguards only that procedural safeguards exist. *Id.* at 861–62. The Court noted that previous cases have found sufficient safeguards because of the availability of writs of certiorari, among other things. *Id.*

In *Automotive United*, there were far fewer procedural protections available than here. The only procedures were reports and audits to the Legislature. *Id.* at 861. This certainly provides vastly fewer protections than the process afforded under the HTCC statute, which allows for notice and opportunity to comment and decisions made under the Open Public Meetings Act. Yet the Court there found the statute constitutional—

pointing to the court challenge in the case, despite no statutory route to judicial review.[13]

Additionally, other Supreme Court cases establish that the availability of the writ provides for sufficient judicial review in challenges involving the alleged unlawful delegation of power. For example, in *City of Auburn v. King County*, the Court considered whether a statute was unconstitutional because it delegated legislative power to a board of arbitration. 114 Wn.2d 447, 452, 788 P.2d 534 (1990). Although the statute at issue did not provide for judicial review of board decisions the Supreme Court held that a party could seek limited judicial review through a writ of certiorari. *Id.* The court held that "[a]dministrative procedures tending to discourage arbitrary action provide adequate safeguards when combined with limited judicial review." *Id.* Likewise, the HTCC procedures provide an open and transparent process in making decisions that discourages arbitrary actions, combined with the judicial review in a

[13] Below Murray tried to distinguish *Automotive United* by asserting that (1) the case did not directly impact the plaintiff, (2) the statute did not prohibit judicial review, and (3) all available avenues were available for review. CP 92. These arguments have no merit. (1) the *Automotive United* Court allowed for consideration of the plaintiff's claims, even if not directly affected, (2) there was no statutory provision authorizing judicial review, and (3) the Court pointed out that the Legislature need not provide for judicial review in the statute given the writ availability. 183 Wn.2d at 861. The Court did not say that all avenues of judicial review were available in that case as Murray asserted. 183 Wn.2d at 861; CP 92.

constitutional writ.[14] Under *Automotive United*, there are not any mandated types of procedure the Legislature must provide. 83 Wn.2d at 861.

Similarly in *McDonald v. Hogness*, the Court found that judicial review under the arbitrary and capricious or abuse of discretion standards, coupled with published criteria for a body's decisions, were sufficient. *McDonald v. Hogness*, 92 Wn.2d 431, 446–47, 598 P.2d 707 (1979). Because the limited judicial review combined with other procedures would prevent abuse, the court held that the second prong of the *Barry & Barry* test was fulfilled. *Id.*[15]

The Legislature has provided explicit criteria for the HTCC's decision-making process, and there is an arbitrary and capricious review available under the constitutional writ. RCW 70.14.110 ("[S]hall consider, in an open and transparent process, evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the

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[14] Below Murray tried to distinguish this case because the statute allowed for arbitration, in addition to the availability of the writ. CP 91-92. But the court in *City of Auburn* found significant the fact that the government appointed members of the arbitration panel, and here the government appoints the HTCC. 114 Wn.2d at 452; RCW 70.14.090. And in any event, *Automotive United* did not require any particular level of administrative procedure and it is the most recent case on point to follow. 183 Wn.2d at 861.

[15] Below Murray tried to distinguish this case by arguing that (1) the statute did not prohibit review and (2) the plaintiff had the right to be heard in the application process. But (1) the statute in *McDonald* did not authorize a judicial review and yet the Court found no constitutional violation. 92 Wn.2d at 446. And (2) anyone may participate in the public hearing and comment process of the HTCC.

systematic assessment conducted under RCW 70.14.100(4)."); RCW 70.14.100(4) (detailing procedures for assessment); *Williams*, 97 Wn.2d at 221 (under writ, court reviews for arbitrariness and capriciousness).[16] The Legislature lawfully delegated legislative authority.[17]

Murray criticizes the decision of the HTCC, characterizing it as unobjective and "controversial." Appellant's Br. 17–18. He bases his arguments on comments by a small number of commentators. AR 345-47. But the record reflects the paucity of objective evidence supporting the view that FAI surgery is safe and effective. CP 81–245. Doctors should only use procedures proven safe and effective by evidence-based methods and Washingtonians receiving state-purchased health care benefits should

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[16] Ignoring the effect of *Automotive United* and related decisions, Murray below cited to *United Chiropractors of Washington, Inc. v. State*, 90 Wn.2d 1, 6, 578 P.2d 38 (1978). CP 22. But the statute under review in *United Chiropractors* is distinguishable from the HTCC statute. There, the court held a statute unconstitutional when the Legislature delegated authority to private organizations to appoint members to disciplinary board because the nature of the private organization did not provide a curb on abuse. *Id.* at 5. Here in contrast the appointing authority is a public agency. RCW 70.14.090; CP 69-70. Below Murray also mistakenly relied on *In re Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979). That case involved a challenge based on notice and opportunity to comment when the Board of Pharmacy enacted emergency rules regarding the decision to classify controlled substances, rules that could lead to felony convictions. *Id.* at 892-94. None of the same kind of concerns is present here. *Powell*, which involved loss of liberty, contrasts with the solely economic interest regarding reimbursement for unauthorized treatment involved here. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60–61; *Powell*, 92 Wn.2d at 887. No statute prevented Murray from having the surgery, and indeed he did, the only issue here is the economic issue of who pays for it. CP 71, 85-86.

[17] Murray cites to a flawed superior court decision. The court does not consider superior court decisions. *Bauman v. Turpen*, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007). In any event, the superior court judge in that case failed to consider the case law that a writ of certiorari provides sufficient procedural protection under the second prong of *Barry & Barry*. Murray ignores that another superior court has considered the applicable case law and ruled that the HTCC statute is not an unconstitutional delegation of power. CP 76-79.

benefit from this scientific approach. RCW 70.14.100. Regardless, whether the HTCC was arbitrary and capricious in its decision-making is not before this Court. If those who commented had wished to raise such arguments, they could have sought a writ of certiorari. They did not do so.

Murray's arguments about the merits of the HTCC decision underscore why the Legislature created the HTCC. Some individual doctors may believe a given treatment is useful and there may be anecdotal evidence of success in an individual case. But the Legislature wanted a system that uses evidence-based medicine that applies to the majority of patients instead of relying on anecdote-based medicine and this Court should uphold this policy choice.

Finally, it is not necessary that there be an individual appeal right for there to be a constitutional delegation of power, provided that the two-part *Barry & Barry* test is satisfied; where that test is satisfied the legislative decisions of the delegated tribunal—here the HTCC—stand. *Barry & Barry, Inc.*, 81 Wn.2d at 164 (properly promulgated regulation binding). The Legislature's delegation of power to the HTCC is constitutional because procedural safeguards exist to control arbitrary administrative action: an open and transparent decision-making process and judicial review through the writ process. The Court should reject Murray's separation of powers challenge.

E. If Murray Prevails, Then His Only Remedy Is Remand to the Department

If the Court does not accept the Department's arguments and reverses the trial court's decision, it cannot give Murray the relief he seeks. Murray asks this Court to reverse the Department's decision to deny the FAI surgery, arguing it was proper and necessary treatment in hindsight. Appellant's Br. 5, 22, 28. But the Board did not have before it the question of whether the treatment was proper and necessary.[18] As Murray admits, the Department decided this case based on the HTCC determination only. AR 57, 63–64; Appellant's Br. 7. The Department has not independently passed on the issue of whether the FAI surgery is medically proper and necessary treatment. AR 58, 63–64.

At the Board, the issues on appeal are fixed by the Department order. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality opinion) (explaining that Board's appellate authority "is strictly limited to reviewing the specific Department action" from which the party appealed); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994); *Lenk v. Dep't of Labor &*

[18] Additionally, Murray did not argue for the hindsight test in his petition for review, thus waiving the argument. AR 5-7. A party waives an argument not made in its petition for review at the Board. RCW 51.52.104; *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012).

Indus., 3 Wn. App. 977, 986–87, 478 P.2d 761 (1970); *see Leary v. Dep't of Labor & Indus.*, 18 Wn.2d 532, 541, 543, 140 P.2d 292 (1943). In *Leary*, the Department rejected a claim because it found that the claimant was not acting in the course of employment. 18 Wn.2d at 534. The Court reversed, determining he was in the course of employment. *Id.* at 542–43. The Court then remanded to the Department to determine the separate question of whether he sustained an injury. *Leary*, 18 Wn.2d at 541, 543. In other words, the Court could not consider the question of whether an injury occurred because the Department had not yet passed on it. *See id.*

That the issues being litigated are only those set forth by the Department order is consistent with the Supreme Court's acknowledgment that the Industrial Insurance Act confers purely an "appellate function" on the Board and the courts in workers' compensation appeals under RCW Title 51. *Kingery*, 132 Wn.2d at 171. The Board only obtains appellate jurisdiction when a party appeals a Department decision. *Id.* It is the Department's order that is the central inquiry of a Board appeal—it sets the Board's "scope of review," which cannot be expanded beyond the matters adjudicated in the Department's order. *See Hanquet*, 75 Wn. App. at 662. At most, this Court could remand the matter to the Department and direct it to consider whether the treatment that Murray seeks is proper and

necessary care because the Department did not first adjudicate whether the treatment is proper and necessary. *See Leary*, 18 Wn.2d at 541.

F. Murray Is Not Entitled to Attorney Fees

Murray is not entitled to attorney fees even if he should prevail. *Contra* Appellant's Br. 27–28. A court may award fees against the Department only if the claimant requesting fees prevails in the action and if the litigation affects the accident fund or medical aid funds. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Here, the court proceeding will not directly affect the accident fund or medical aid fund. The only relief that Murray may obtain is a remand to the Department to determine if the FAI surgery is proper and necessary treatment.

Because a remand to the Department does not affect the medical aid or accident fund, a claimant's attorney cannot receive attorney fees when remand is the only relief that the claimant obtains on appeal. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 27, 288 P.3d 675 (2012). This is true even if, on remand, the claimant ultimately obtains benefits that affect the accident or medical aid fund. What is necessary is a direct and immediate impact on the funds from "for services before the court only" (RCW 51.52.130), not the hypothetical possibility of future benefits. RCW 51.52.130. In *Knapp*, the court declined to award attorney fees

under RCW 51.52.130(1) when it remanded to the Department to determine whether the claimant would need additional vocational services. 172 Wn. App. at 27. Here, "the litigation" does not result in "additional relief" that would affect the accident fund or the medical aid fund. Murray is not entitled to attorney fees because he should not prevail in this matter, but even if he does RCW 51.52.130 does not authorize the award of fees here.

VI. CONCLUSION

This Court should not overrule the well-reasoned *Joy* decision. It correctly implements the Legislature's intent to have safe and effective treatment for Washington citizens receiving state-purchased health care.

The Legislature may provide for a uniform system to determine health care coverage without implicating due process concerns, where, as here, the Legislature has properly delegated its power. The Court should affirm.

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RESPECTFULLY SUBMITTED this 29th day of November, 2016.

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No. 48870-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL E. MURRAY, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES and BROCKS INTERIOR SUPPLY, INC., Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent (Corrected) and this Certificate of Service in the below described manner:

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DATED this 29th day of November, 2016.

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WASHINGTON STATE ATTORNEY GENERAL

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Court of Appeals Case Number: 48870-1

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